TAJUDDIN SHEIKH DAUD

v.

WONG KIM YIN

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 25-224-87]
5 APRIL 1989

TORT: *Negligence - Road accident - Totally irreconcilable versions of the accident - Quantum - Damages awarded - Plaintiff discharges himself from government hospital against medical advice and readmits into private hospital - Expenses incurred - Whether claim for expenses at private hospital allowable.*

The plaintiff was riding a motor cycle on the correct side of a road from the direction of Kuala Lumpur to Ipoh. He said he saw 2 oncoming cars. The car behind the other car tried to overtake and came towards his motor cycle at an angle and knocked into the right side of the motor cycle, and his right leg was badly injured.

The defendant gave a totally different version of the accident. He claimed that the plaintiff's motor cycle had come out from a side road without stopping at the main road and turned towards its right. He applied the brakes but his car hit the motor cycle. He explained that the absence of brake marks on the sketch plan was because it was still drizzling.

Medical evidence showed that the plaintiff had suffered a fracture of right femur, 3 fractures of the right fibula, a fracture of the right tibia, and a fracture of the right clavicle. During treatment the plaintiff had discharged himself from the government hospital against medical advice but had readmitted himself into a private hospital on the following day.

The issue was whether the expenses incurred at the private hospital were allowable.

Held:

[1] Having considered the evidence, the Court found wholly for the plaintiff.

[2] The plaintiff was awarded the following damages:

(a) General damages for pain and suffering RM35,000.

(b) Damages at RM400 per month for partial future loss of earnings for the number of years' purchase as ascertained in the Civil Law (Amendment) Act on annuity table with no interest.

(c) Loss of earning assessed at RM800 per month from the date of accident to the date of judgment.

(d) As regards the plaintiff's action of discharging himself from the government hospital and readmitting himself into a private hospital against medical advice, the Court found that he was receiving grossly inadequate attention and treatment. Therefore the plaintiff was entitled to try to seek greater recovery of his injuries and reduce his residual disabilities by discharging himself from the government hospital. Plaintiff's claim for RM19,840.10 as the expenses incurred was allowed.

(e) Usual rates of interest and costs to the plaintiff.

[Plaintiff's claim allowed with costs.]

[Editor's Note: The defendant has appealed to the Supreme Court *vide* Civil Appeal No. 01-112-89 against the whole of the decision on liability and quantum.]

For the plaintiff - P.S. Gill (Ramachandran with him); M/s. Cheang, Lee & Ong
For the defendant - Shan Gnasalingam; M/s. Daim & Gamany

JUDGMENT

Peh Swee Chin J:

As usually happens in running-down cases, there were 2 totally irreconcilable versions of the manner in which the accident in question took place and the Court was obliged to separate the chaff from the grain.

According to the plaintiff, riding a motor cycle in front of the Police Station in Gopeng town on his correct side of the road, from the direction of Kuala Lumpur to the direction of Ipoh, he met with an accident. He said he saw a car, and in almost the same breath, he said he saw 2 on-coming cars. The car behind the other car tried to overtake the car in front and came towards his motor cycle at an angle and knocked into the right side of the motor cycle, and his right leg was badly injured, in addition to other injuries. He denied that he had come out to the road or the scene of accident from a side road (which led to a Chinese New Village).

The defendant, the driver of the motor car involved in the same accident said he was travelling at 50 kph and not more than 50 kph, about 2 feet from his left edge of the road. He said that the motor cycle had come out from a side road without stopping to the main road (i.e., the scene of accident) and at that time he was travelling about 20 to 25 feet from the motor cycle. The motor cycle came to the main road and turned towards its right. He applied brakes but his car hit the motor cycle on the latter's middle right section in the middle of the road. He explained that the absence of brake mark on the sketch plan was because it was still drizzling. He was 20 feet away when the motor cycle came out at the speed of between 10 to 15 kph. He changed his mind and said that on seeing the motor cycle coming out, he reduced his speed to between 30 to 40 kph. He became excited.

The defendant disagreed further that according to his own evidence the accident would have occurred on his left side of the road, (please see my comments on the sketch plan in this connection). He then said that he applied emergency brakes after swerving to his right and that he travelled for about 10 feet before he swerved to his right. He was shown a photo of the scene (Exhibit P2C) and agreed he could see some sort of the mark (made by some other vehicle). He said though the rain had stopped, it was still drizzling.

The sketch plan showed both vehicles to be on the plaintiff's correct side of the road with the car protruding somewhat into the grass verge at almost a right angle to the left edge of the road of the plaintiff, and the motor cycle lying on its left side body, also facing the same grass verge at a rather pronounced angle to its left.

The medical evidence showed he had a fracture of right femur, 3 fractures of the right fibula, a fracture of the right tibia, and a fracture of the right clavicle.

I accepted the evidence of the defendant rather than the evidence of the plaintiff who did not impress me as a witness of truth, and this impression was fortified by the sketch plan. If he was travelling two feet from his left edge of the road, and was 20 feet away from the plaintiff when he first saw the plaintiff, the accident could have in all probability occurred on the defendant's left half of the road, and both vehicles would have landed on the defendant's left half of the road, possibly near the middle of the road, more probably in less

than one second, the collision would have occurred immediately. The Court considered also that according to the table of braking distances, at 20 mph, the car would have covered 40 feet and at 30 mph (about 50 kph), 75 feet, and the distances given by the defendant who was an engineer, would have to be taken rather seriously. The injuries which were concentrated on the right side of the plaintiff, and relied on heavily by the defendant's Counsel, were equally consistent, if not more so, with the story of the plaintiff. The absence of any brake mark, I found could not be satisfactorily explained as being due to the drizzling as stated by the defendant as one of the photos showed some sort of tyre mark which was made by some vehicle apparently, and which was neither obliterated by the rain water, nor was it prevented from being formed or visible by such rain water. It appeared to me that he did not, as he claimed, apply emergency brakes. He could not have possibly had time to apply the brakes just before the collision; due to such closeness (i.e., 20 feet) to the motor cycle. I found that he was in pain, and that due to the nature of a police report as opposed to a detailed statement to be taken by the police, the fact that the plaintiff did not mention in his first police report that he saw 2 on-coming cars instead of one did not affect plaintiff's credibility as a witness.

I therefore found wholly for the plaintiff. I shall now deal with the damages to which the plaintiff deposed as follows.

He said he was a tradesman purchasing goods and selling the same to estate workers, i.e., to the workers of Kota Bharu Estate just outside Gopeng. He had on that morning gone to the same estate for business and had collected some debt from a customer who also testified to it. He was earning at least RM1,000 p.m. but all documents in connection with his earnings were thrown away by the new tenant of his office as he was under treatment for more than 1 year and was not able to pay rent.

He incurred a sum of RM19,840.10 for treatment received in Hospital Fatimah (a non-Government mission hospital). He had moved there from General Hospital from which he had discharged himself, said to be against medical advice, (but apparently without any direct encouragement from the staff of the General Hospital).

The Court found that he was receiving grossly inadequate attention and more probably than not, inadequate treatment. According to Dr. Pritam Singh (DW1) called by the defence, he was a medical officer (not a specialist surgeon) at that time and had 250 orthopaedic patients to look after. He agreed that there was a shortage of doctors. It was he and another Dr. Chew (who was only a medical officer and not a specialist surgeon) performed the operation on the plaintiff in General Hospital. Normally, I think, only an orthopaedic surgeon, or at least a specialist surgeon should perform operation, and not ordinary doctors, though I can imagine that in war or near a battle field, an ordinary doctor would have been a blessing. Dr. Pritam Singh said he had to see 250 patients all on the same day. The plaintiff complained further and the Court accepted what he said that his clavicle fracture was not attended to. Dr. Pritam Singh said he was aware of the plaintiff's diabetic condition and he said there was pus discharge from the plaintiff's wound. Plaintiff said one Dr. Mathews (who took over from Dr. Pritam) had told him of the possibility of gangrene setting in, and the necessity of amputation of his leg. Dr. Mathews was not called and I accepted this evidence. The plaintiff was admitted to Hospital Fatimah on the day he discharged himself from General Hospital Ipoh and on the following day he was operated by Dr. K. Sivananthan, the distinguished orthopaedic surgeon of Hospital Fatimah, and altogether 3 major operations and a number of minor operations were performed at Hospital Fatimah. He found plaintiff discharging pus from the wound on admission to Fatimah Hospital, please see details of his operations from his evidence.

Because of the grossly inadequate attention and rather inadequate treatment, coupled with a great deal of apprehension as to the possible amputation of his right leg which Dr. Mathews had told him in General Hospital, the plaintiff was simply quite entitled to try to seek greater recovery from his injuries and reduce his residual disabilities by discharging himself from General Hospital and admitting himself to the Hospital Fatimah. The claim for RM719,840.10 was therefore allowed.

I found that the monthly earnings of RM1,000 as alleged, to be on the high side, considering the type of business that he carried on prior to the accident, and the lack of documentary evidence such as notices of assessment of income tax or returns of income submitted to the Inland Revenue in respect of this particular business. I assessed it at RM800 p.m. He had been unable to get a job up to the date of judgment on 24 February 1989 and the date of accident was 1 September 1986. He was most of the time at Hospital Fatimah with rather short periods during which he had been discharged again and again for outpatient treatment, and similarly readmitted for further operations until he was discharged on 28 April 1987 when thereafter he received out-patient treatment. He had 3 major operations and a number of minor operations.

I therefore assessed his pre-accident income at RM800 pm which I awarded him as the basis of total past loss of earnings from the date of accident i.e., 1 September 1986 to date of judgment i.e., 24 February 1989 as I accepted his evidence that he had been unable to obtain employment with his physical disabilities including limitation of right ankle joint and inability to dorsiflex his right toe, weakness of the muscles in the right lower limb and limping, all these resulting in his inability to drive a van or a motor cycle making it quite impossible for him to resume his business of itinerary tradesman. I accepted his evidence that the Labour Office where he registered his name as an unemployed had not called him up for any interview.

I further awarded RM400 p.m. as the figure for partial future loss of earnings for the number of years' purchase as ascertained in the Civil Law (Amendment) Act with such loss carrying no interest i.e., 55-39/2, the figure referring to his age at the time of sustaining the injuries.

I awarded also for pain and suffering a sum of RM35,000 for the comminuted fracture of the right clavicle, the intertrochanteric fracture of the right femur, comminuted fracture of the right tibia, crack fracture of the medical malleolus, 3 fractures of the right fibula, the number of operations at both hospitals, the long stay in the hospital. I also awarded the usual rates of interest on all general damages and on special damages as agreed and costs.

Also found at [1989] 2 CLJ 237